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SUBJECT: ZUMA, STATE PONDER NEXT STEPS AFTER COURT RULING

REF: PRETORIA 47

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11. (U) Summary: The Supreme Court of Appeal on January 12 reinstated the corruption case against African National Congress (ANC) President Jacob Zuma, overturning an earlier verdict that had tossed out the charges related to the controversial 1998 arms deal on a technicality. (Note: The state charged Zuma with corruption, money laundering, racketeering, and fraud shortly after he won the ANC presidency in December 2007. End Note.) Pietermaritzburg High Court Judge Chris Nicholson ruled in September 2008 that the state's case against Zuma was invalid because the National Prosecuting Authority (NPA) did not allow Zuma to make representation before indicting him. The decision also noted allegations of a political conspiracy against Zuma "could not be ruled out," and ultimately led to the forced recall of former President Thabo Mbeki. The Supreme Court of Appeal, in reinstating the case, offered a scathing rebuttal of the Nicholson ruling and declared the NPA did not have a legal obligation to give Zuma representation. Zuma and the ANC are exploring a number of legal options that would keep him in position to win the presidency in the election, while most pundits and political analysts say this legal drama is far from over. End Summary.

The Ruling: Supreme Court of Appeal Weighs In

12. (U) The Supreme Court of Appeal, in overturning Nicholson's verdict on January 12, pointed to a number of errors in the lower court's ruling. The Court declared Nicholson's allegations of a political conspiracy as "erroneous," "unwarranted," and "incomprehensible." Supreme Court of Appeal Judge Louis Harms said Nicholson overstepped the limits of his duty as a judge. He said, "[Nicholson's findings] were part of his own conspiracy theory and not one advanced by Mr. Zuma." Harms wrote, "[Nicholson] changed the rules of the game, took his eyes off the ball, and red-carded not only players but also spectators." Harms also upheld the role of the NPA in prosecutions, noting that "an Attorney General (or NDPP) is required by convention to make prosecutorial decisions without regard to political considerations and may not subject his discretionary authority to that of government. He or she is also not responsible to government to justify the exercise of his or her discretion because this political office has judicial attributes."

What Happens Next: Zuma's Legal Team Pushes Back

13. (U) Zuma's legal team has at least five options. First, it can refer the Supreme Court of Appeal decision to the Constitutional Court. Second, the team could request a stay of

prosecution, where the NPA would halt proceedings against the ANC leader after consultation. Third, it could take its chances and go to court. (Note: Pundits argue that Zuma says "he has not had his day in court" while noting that he has done everything to avoid a corruption case going through the justice system. End Note.) Fourth, the team could seek to delay so the ANC wins the election and Parliament amends the Constitution to prevent the prosecution of a sitting president until he leaves office. Fifth, it could cut a deal with the NPA.

¶4. (U) Each of the options would take time away from Zuma and the ANC's efforts to win and consolidate power. Appealing to the Constitutional Court, going to court, and delaying until after the election would be the options that take the most time because of the legal work involved. The legal team appears to be pursuing all options, but so far has only made representation to the NPA now that the charges stand. Zuma's attorney told reporters on January 12 the team would examine whether appealing to the Constitutional Court is possible and during the past week the press reported rumors of Zuma's team seeking a deal with the NPA.

What Happens Next: The State's Case Stands

¶5. (U) The state has made clear that its charges against Zuma stand. The NPA, which has now been vindicated, must decide in the short term whether to work with Zuma's legal team to have Nicholson recused from presiding over any eventual trial of Zuma. Over the longer term, the NPA must weigh whether to strike a deal with Zuma's defense team or counter charges in court or an appeal in the Constitutional Court. The NPA in many ways is in a reactionary position even as its charges stand. NPA spokesperson Tlali Tlali on January 12 welcomed the ruling and indicated that the NPA is now ready to proceed with the prosecution of Zuma. However, he acknowledged the NPA is aware that other legal avenues are still available to Zuma.

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What Happens Next: Commentators Offer Insight

¶6. (U) Political analysts and legal pundits offered a variety of views on the Supreme Court of Appeal's judgment, most sharing the assessment the legal drama surrounding the ANC leader is far from over. Constitutional law expert Pierre de Vos said, "The judgment ~ deals a blow to Mr Zuma's potential legal arguments about a permanent stay of prosecution as it makes clear that a 'prosecution is not wrongful merely because it is brought for an improper purpose.' It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded." Center for Policy Studies political analyst Ebrahim Fakir said, "The appeal decision means we are back at square one. We must brace for another round of legal battle, which will probably end in the Constitutional Court." Law expert Shadrack Gutto noted that the easiest solution for Zuma, and for the country, would be for his legal team to strike a deal with prosecutors. However, he said that such a move would be politically risky. He said, "This might be seen as conceding guilt, and he will be required to make some serious disclosures." Gutto said this saga is long from over and will "hang over Zuma's head."

Comment

¶7. (SBU) The Supreme Court of Appeal's ruling against the Nicholson verdict was largely expected by legal experts and the ruling party. (Note: Housing Minister Lindiwe Sisulu told Poloff in East London on January 10 the ANC would not travel to Bloemfontein to hear the decision because the party expected the outcome to be unfavorable. End Note.) Zuma and the state have a number of legal options available to them, but weighing those options and putting a plan in place will take time and resources. More than anything, this ruling vindicates supporters of Thabo Mbeki who will argue that the ANC erred in recalling him from the presidency; South Africa watchers are

awaiting his reaction. However, this judgment will not change the ANC's decision of nominating Zuma for president, nor will it revisit the recalling of Mbeki. The Congress of South African Trade Unions and the South African Communist Party have declared their continued support for Zuma and so has the ANC Youth League. As far as Zuma supporters are concerned it is business as usual. The SCA judgment will not stop them from ensuring that Zuma ascends to the presidency after elections with or without corruption charges.

18. (U) This message was drafted by Durban Pol-Econ Assistant in collaboration with visiting Pretoria PolOff.
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